

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

1650 BROADWAY ASSOCIATES, INC.,	:	
	:	Case No. 02-RM-184263
Employer-Petitioner	:	
	:	
and	:	
	:	
v.	:	
	:	
STARDUST FAMILY UNITED,	:	
a/w INDUSTRIAL WORKERS OF THE	:	
WORLD	:	
Union	:	

**1650 BROADWAY ASSOCIATES, INC.'S MOTION
FOR RECONSIDERATION OF THE BOARD'S ORDER DATED MAY 17, 2017**

Pursuant to Section 102.65(e)(1) of the National Labor Relation Board's Rules and Regulations, Employer-Petitioner 1650 Broadway Associates, Inc. d/b/a Ellen's Stardust Diner ("Stardust" or the "Employer") hereby moves for reconsideration by the Board of its Order in this proceeding dated May 17, 2017 (the "Order"). As further explained below, the Board's majority and the Regional Director did not consider material evidence that established the Employer's claim that Stardust Family United (the "Union"), affiliated with the Industrial Workers of the World, claimed that it (1) represented a majority of Stardust employees and (2) sought to discuss/negotiate the terms and conditions of employment of all server, server support and kitchen (front and back of house) employees with Stardust. Undisputed evidence (that the Union claims to have the support of all of the employees) not referred to in the Board's decision contradicts the rationale upon which the Board's majority based its decision (that the Union did

not have support of the majority of the employees in the sought after unit) upholding the dismissal of the Employer's RM petition.

The Regional Director's stated reason for dismissal was solely that the Union did not make a present demand for recognition. Therefore, the focus of Stardust's appeal addressed that argument and established that the Union made a present demand for recognition. Notwithstanding the focus of Regional Director's decision and Stardust's appeal, the record evidence established the Union's claim that it represented at least a majority of the employees. However, the Board's decision is devoid of any mention of this evidence, even though it bases its decision on the Employer's failure to establish that the Union represents a majority of the employees. That conclusion not only ignores the direct evidence, it contradicts it. The Board's apparent lack of consideration of decisive evidence from the record below on the key issue underlying its decision, in the interest of justice, provides the extraordinary circumstances to reconsider and reverse the Board's Order.

I. PROCEDURAL HISTORY

On September 14, 2016, Stardust filed the underlying RM petition to determine whether a majority of its employees supported the Union. Stardust filed the RM petition after it perceived several communications from the Union requesting negotiations over mandatory subjects of bargaining. In these communications, the Union claimed it represented the entire front (service areas) and back (kitchen/ server support) non-management personnel. Attached to the RM petition were several documents that established the Union made a present demand for recognition and represented a majority of the employees. This included:

- An e-mail containing a letter from the Union on August 26, 2016 in which the Union claimed that it "represents the interests of all front and back of house

staff.” (See Certification of Patrick J. McCarthy, Esq. (the “McCarthy Cert.”) at Exhibit C).¹

- An affidavit of Counsel from the Employer, where Stardust’s attorney Brent Yessin affirmed that: (1) during a September 9, 2016 meeting, one of the self-identified leaders of the Union, Kenton Friedley claimed that the Union represented a majority of the employees, including “front and back of the house” and further clarified that Mr. Friedley meant the “servers, bussers, runners, cooks, and dishwashers, among others”, which includes all of the non-management restaurant employees at Stardust; and (2) during a September 8th meeting, Kristen Bogan,² another the self-identified leader of the Union, claimed that the Union claimed represented a majority of employees including “front and back of house.” (See McCarthy Cert. at Exhibit D)³
- An e-mail containing a letter from the Union on September 14, 2016, where the Union requested to bargain over mandatory subjects of bargaining. (See McCarthy Cert. at Exhibit E).⁴

On October 26, 2016, Stardust filed its Position Statement with the Region. On November 22, 2016, the Regional Director issued a decision to dismiss the petition and found that further proceedings were unwarranted. The Regional Director determined the “evidence obtained during the investigation of the petition . . . fail[ed] to show that the Union’s conduct constituted a present demand for recognition or that the Union was seeking recognition as the

¹ Formerly Exhibit A to the Position Statement originally filed by the Employer on October 26, 2016, with the NLRB Region 2 in support of Stardust’s RM petition (the “Position Statement”).

² Ms. Bogan’s leadership role is further evidenced by her having signed on behalf of the Union a contemporaneous Charge with the Board in Case No. 02-CA-184293, and we ask the Board take administrative notice of this further evidence.

³ Formerly Exhibit G to the Position Statement.

⁴ Formerly Exhibit I to the Position Statement.

employees' representative." (*See* Exhibit A to the McCarthy Cert.). Nothing in the Regional Director's decision related to the notion that the Union did not have majority support.

On November 29, 2016, Stardust filed a request for review pursuant to Section 102.67 of the Board's Rules and Regulations. The Union filed its opposition to Stardust's request for review on December 12, 2016. On January 26, 2017, a supplemental submission on behalf of Stardust was filed with the Board.

On May 17, 2017, in a 2-1 vote, the Board denied Stardust's Request for Review of the Regional Director's administrative dismissal of the petition on the basis that the employer only may successfully file a RM petition when the Union has "presented a claim to be recognized, ... [as] supported by a majority of employees." The Board majority, agreed with the Regional Director's determination that the "Union's communication to the employer can therefore only be read as coming on behalf of those employees who supported the Union" at the time the Union sent an e-mail to Stardust on September 14, 2016, stating that it would like to "sit down and discuss [its] concerns related to "new equipment [and] adequate staffing. . . ." (*See* McCarthy Cert. at Exhibit B). The majority's opinion failed to address the several pieces of evidence establishing that the Union claimed support by all employees.

Chairman Miscimarra dissented from the Board's decision, stating that he believed, the Union's statements were "more than sufficient to establish that the Union is, in fact, not only seeking to adjust grievances with the Employer, but also demanding recognition as the representative of Ellen's Stardust Diner employees. . . ." This Motion follows.

II. LEGAL ARGUMENT

A. Legal Standard

Section 102.65(e)(1) provides that a party “may, because of extraordinary circumstances, move . . . for reconsideration, for rehearing, or to reopen the record. . . .” Further, pursuant to this Rule, a motion for reconsideration “shall state with particularity the material error claimed with respect to any finding of material fact. . . .”

In this matter, the Board (as well as the Regional Director) failed to consider and did not address in its decision uncontested evidence that directly contradicted the majority’s determination that the Union’s conduct did not constitute a present demand for recognition or that the Union claimed it was representing a majority of the employees. This was a material error. When all the evidence presented to the Board is viewed in its totality, it leads to the conclusion made by Chairman Miscimarra in the dissent – that the Union sought to negotiate and adjust grievances with the Employer for and was acting on behalf and with the support of a majority of the employees.

B. Statement of Material Errors That Should Be Reconsidered by the Board

In dismissing the Employer’s Request for Review of the Regional Director’s administrative dismissal of the petition, the Board majority agreed with the Regional Director that “the Union did not demand recognition as a majority representative. . . .” (*See* McCarthy Cert. at Exhibit A). In affirming that decision, the Board found that a September 14, 2016 e-mail from the Union to the Employer, wherein the Union expressed interest in discussing its “concerns” with the Employer over the terms and conditions of employment, was insufficient to establish that the Union had “the unit’s majority support for doing so or request[ed] recognition as the majority representation.”

The totality of the evidence demonstrates that the Board overlooked the following key record evidence that support the Employer's petition and the Dissent's conclusion. First, Stardust submitted a letter it received via e-mail from the Union dated August 26, 2016, notifying the employer that Stardust Family Union "***represents the interests of all front and back of house staff.***" (See McCarthy Cert. at Exhibit C) (emphasis added). This letter, purporting to represent "all" employees, evidences that the Union sought recognition to negotiate for certainly a majority, if not all, of employees and not simply a subset that may have supported the Union at that time and implies it had majority support of the restaurant's front and back of house (all hourly) staff. In addition, the Employer provided the Board with an Affidavit of Brent W. Yessin, Esq., an attorney hired by Stardust. (See *id.* at Exhibit D). In the Affidavit, Attorney Yessin described two separate meetings in which leaders of the Union confirmed the Union represented the majority of Stardust employees and had sought a meeting with management to discuss the terms and conditions of employment. (*Id.* at ¶¶8-10). Finally, after receiving the August 26 letter and Mr. Yessin's discussions with Union leadership, Stardust received the September 14, 2016 letter wherein the Union specifically asked for a meeting to "discuss [their] concerns" which were related to the terms and conditions of employment. (See McCarthy Cert. at Exhibit E). This letter follows the representations, picketing, and other conduct of the Union which led the Employer to file the RM petition due to its uncertainty about whether it should meet with the Union..

Affirmative representations by leaders of the Union that it represents all Stardust employees covered by Stardust's petition, and no evidence in the record to the contrary, warrants a finding that the Union sought recognition for (at least) a majority of employees. Simply stated, the evidence presented to the Regional Director and reviewed by the Board contradicts the

majority's determination that the Union did not make a demand for recognition as a majority representation.

This case is distinguishable from *New Otani Hotel & Garden*, 331 NLRB 1078 (2000), cited by the Board for support, where the Board specifically noted that there was “no evidence to indicate that the Union at any time conveyed to the Employer any claim, written or oral, that it represented its employees or that it was seeking immediate recognition or a contract.” *Id.* at 1080. Here, the record shows that the Union made *affirmative* representations both orally and in writing on at least four (4) separate occasions that it represented all Stardust employees (front and back of house) and that it sought to meet with management to discuss the terms and conditions of employment on behalf of all of those employees.

In his dissent, Chairman Miscimarra focused on the underlying rationale the Regional Director set forth in her dismissal (*i.e.*, whether there was a present demand for recognition). Chairman Miscimarra found that even the last piece of evidence described above – the September 14, 2016 letter – was persuasive enough to find that the Union not only sought to “adjust grievances with the Employer” but that the Union sought to reach an agreement for “both sides,” which, in his view, established the Union’s present demand for recognition. While Stardust agrees with Chairman Miscimarra’s interpretation of the law as applied to these facts, it submits that the record is laden with additional evidence that supports the Chairman’s conclusion, and decisively disproves the conclusion of the majority that there was no claim by the Union of requesting recognition to negotiate for and having majority support of the potential bargaining unit referenced in the Employer’s RM petition that the Regional Director dismissed.

III. CONCLUSION

Stardust respectfully submits that the evidence initially not given weight, if considered at all, at both the Regional Director and Board levels, demonstrates that the Union *did* present a demand for recognition as it held itself out on multiple occasions as representing *all* Stardust employees described as the unit in the RM petition and attempted to meet with management to discuss terms and conditions of all of those employees, and not just a supportive minority. There is ample evidence in the record that supports this conclusion and contradicts the initial findings by the Regional Director and the Board.

For the reasons above, it is respectfully requested that the Board grant Stardust's Motion for Reconsideration based on the totality of the evidence submitted in this case and reinstate the Employer's petition.

Respectfully submitted,

/s/ Patrick McCarthy
A Member of the Firm

DAY PITNEY LLP
One Jefferson Road
Parsippany, New Jersey 07054
Telephone: (973) 966 8036
Facsimile: (973) 206 6081

Attorneys For Employer-Petitioner
1650 Broadway Associates, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on this date an original and eight (8) copies of the within Motion for Reconsideration on behalf of 1650 Broadway Associates d/b/a Ellen's Stardust Diner was served upon:

Gary Shinnars
Executive Secretary
Office of the Executive Secretary
National Labor Relations Board
1099 14th Street, NW
Washington, DC 20570-0001

by United Parcel Service – Next Day Air on this date within the time provided by the Board's Rules and Regulations.

A hard copy of the within Motion for Reconsideration on behalf of 1650 Broadway Associates d/b/a Ellen's Stardust Diner was also sent to:

Stardust Family United
c/o Benjamin N. Dictor, Esq.
Eisner & Dictor PC
39 Broadway – Suite 1540
New York, New York 10006-3091

by United Parcel Service – Next Day Air on this date.



PATRICK J. McCARTHY
A Member of the Firm

DATED: May 26, 2017